DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

2000 LEGISLATIVE SUMMARY

This is a summary of the changes and amendments to California's civil rights statutes signed into law by Governor Gray Davis this year. Most of the changes will become effective on January 1, 2001. They are organized by subject matter.

EMPLOYMENT

Non-Management Employee Liability for Harassment

Effective January 1, 2001, all employees of any entity covered by the Fair Employment and Housing Act (FEHA) may be held personally liable under Government Code section 12940, subdivision (h), for harassing a co-worker. With this change, the decision of the California Supreme Court in Carrisales v. Department of Corrections (1999) 21 Cal. 4th 1132, which held that individual co-employees cannot be held personally liable for sexual harassment under the FEHA, is overturned. This change is applicable not only in cases involving sexual harassment, but to harassment based on all enumerated bases set forth in Government Code section 12940, subdivision (h) of the FEHA.

Bill Number: AB 1856 (Kuehl), Chapter 1047
Code Section Affected: Government Code section 12940 (h)

Disability

Restrictions on Employer's Ability to Require Examinations or Make Disability-Related Inquiries

Effective January 1, 2001, statutory changes specify various restrictions on an employer's ability to require medical or psychological testing or ask disability-related inquiries or questions throughout the application and employment process. Most of these statutory changes are consistent with the federal Americans with Disabilities Act of 1990 (ADA).

- Job Applicants

Effective January 1, 2001, the FEHA allows employers to ask job applicants questions related to an applicant's ability to perform job-related functions.

However, the new law prohibits employers from requiring job applicants to undergo any medical or psychological test, or from asking any medical, psychological or disability-related questions prior to making an offer of employment.

- Jobs Offered to Applicants

Once a job offer is made, the employer can require the above examinations and ask disability-related questions. *However, the questions and examinations must be job-related and consistent with business necessity.* Furthermore, all entering employees in the same job classification must be subject to the same questions and examinations.

- Employees Already on the Job

For employees already on the job, employers may require medical or psychological inquiries or examinations if job-related and consistent with business necessity. The employer can also require examinations, and ask disability-related questions where there is an objective basis for believing that an employee may not be able to competently, or safely perform his or her job duties due to a disability.

Interactive Process in Determining Reasonable Accommodation

The new law requires that employers, upon a request for reasonable accommodation by disabled employees or applicants, engage in a timely, good faith, interactive process to determine effective reasonable accommodations. The concept of engaging in an "interactive process" is consistent with the process created to comply with the ADA.

Mitigating Measures are excluded from Physical and Mental Disability Determination

Statutory changes clarify California's position regarding mitigating measures in determining "physical or mental disability." California law is clarified to provide that whether a condition "limits" an individual's ability to participate in major life activities, and thereby constitutes a "physical or mental disability" shall be determined without regard to mitigating measures. Measures such as medications, assistive devices, or reasonable accommodations, shall not be considered unless the mitigating measure itself limits an individual's ability to participate in major life activities.

This is in response to three U.S. Supreme Court cases which held that the determination of whether a person has an ADA disability must take into

consideration whether the person may not be substantially limited in a major life activity because of the use of a mitigating measure. (See Sutton v. United Airlines (1999) 119 S.Ct. 2139; Murphy v. United Postal Services (1999) 119 S.Ct. 2133; Albertson's Inc. v. Kirkingburg (1999) 119 S.Ct. 2162.)

Revised Definitions

Effective January 1, 2001, the definitions of physical and mental disability under the FEHA are revised to include a record or history of that disability. These revised definitions are made applicable to Civil Code sections 51, 51.5 and 54 which prohibit discrimination in public accommodations, business transactions, access to public places and employment in the state civil service system.

Also revised is the definition for "medical condition." Government Code section 12926, subdivision (h)(1), provides that a medical condition is any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. Under this new definition, an employer cannot discriminate against a person diagnosed with cancer, rehabilitated or cured from cancer or with a record or history of that cancer. The existing definition is limited to any health impairment related to, or associated with, a diagnosis of cancer, for which a person has been rehabilitated or cured.

Legislative Findings and Declarations

Government Code section 12926.1 is added to the FEHA to state the Legislature's intent that state law "has always, even prior to the passage of the federal act," provided broader protections for disabled persons than the Americans with Disabilities Act of 1990. Specifically, those provisions declare:

- That California disability law provides protections independent from the Americans with Disabilities Act
- That the definitions of physical and mental disability and medical condition are broad
- That the definition of "physical disability" and "mental disability" require a "limitation" upon a major life activity, but does not require a "substantial limitation"
- That a "limitation" on a "major life activity" shall be determined without respect to any mitigating measures
- That "working" is a "major life activity," regardless of whether the actual or perceived working limitation implicates a single job or a broad class of jobs

- That this legislation changes specific interpretations of law in Cassista *v.* Community Foods (1993) 5 Cal. 4th 1050.

Bill Number: AB 2222 (Kuehl), Chapter 1049
Code Sections Affected: Civil Code sections 51, 51.5, 54 and Government Code sections 12926, 12940, 12955.3, and 19231.

Procedural

Effective January 1, 2001, Government Code section 12965, subdivision (c)(1), is amended to clarify that, if an accusation issued by the Department of Fair Employment and Housing (DFEH) is amended to add a claim for emotional damages or administrative fines or both, an employer (respondent) may elect to transfer a DFEH proceeding directly to state court. Existing law is ambiguous as to the nature of the amendment that triggers the right of election.

Bill Number: AB 2062 (Kuehl); Chapter 189
Code Section Affected: Government Code section 12965, subdivision (c)(1)

HOUSING

Restrictive Covenants

Cover Page

Effective immediately, the FEHA is amended to change the content, font size and font color of the cover page that a county recorder, title insurance company, escrow company, real estate broker or agent, or association that provides a declaration, governing document or deed to any person is required to place over property documents. This cover page states, in specified language, that any unlawful restrictive covenant contained in the document is void and may be removed, and that lawful restrictions on age of occupants in senior housing shall not be construed as restrictions based on familial status.

Restrictive Covenant Identification Service

Also, effective immediately is a procedure established within the DFEH to determine whether a restrictive covenant within a specified document violates the fair housing laws. Any person holding an ownership interest in property that he or she believes contains a restrictive covenant may file an application with the DFEH for a determination of whether the restrictive

covenant violates the fair housing laws and is thereby void. If the DFEH determines that the restrictive covenant violates the law, it will issue a specified written document to that effect. The applicant property owner may then strike the void restrictive covenant identified by DFEH from the document. He or she may record the modified document with the written statement from the DFEH attached to it. The Department has 90 days to make such a determination.

Bill Number: AB 1493 (Nakano), Chapter 291
Code Section Affected: Government Code section 12956.1

Senior Citizen Housing

Exempts Pre-1982 Senior Housing from Unruh Civil Rights Act Design Requirements

Civil Code sections 51.2, subdivision (a), and 51.4 were amended to eliminate the sunset provision (time limitation) previously imposed on housing accommodations constructed before February 8, 1982 that failed to meet the special design requirements for senior housing, but were permitted to preserve that housing development for senior citizens. This bill permanently exempts housing accommodations built prior to February 8, 1982 from the design requirements. Existing law provides an exemption from the design requirements for those housing accommodations until January 1, 2001.

Presumption for New Housing Developments

The new law provides that senior citizen housing accommodations built after January 1, 2001 that include specified design elements will be presumed to meet the physical and social needs of senior citizens under the Unruh Civil Rights Act. Riverside County is exempt from the design requirements.

Redefines "Qualified Permanent Resident"

Effective January 1, 2001, the definition of "qualified permanent resident" for purposes of senior citizen housing includes, in part, a disabled person or person with a disabling illness or injury who is a child or grandchild of the senior citizen who needs to live with the senior citizen because of the disabling condition. Current law defines "qualified permanent resident," in pertinent part, to include an adult dependent child with a permanent physical or mental impairment.

The new law also defines "cohabitant" to include domestic partners, in addition to married couples. Current law only includes married couples.

Replaces Existing Housing and Population Density Formula

The definition of a senior citizen housing development for all counties other than Riverside is amended to mean a residential development developed, substantially rehabilitated, or substantially renovated for, senior citizens that has at least 35 dwelling units. Current law contains higher requirements for the number of dwelling units required based on the size of the population and date of construction. Those higher requirements have been eliminated.

Residency Requirements

Clarifies that a senior housing development may require that all dwelling units be occupied by at least one senior and that each other resident be a qualified permanent resident, a permitted health care resident or a person under 55 who had resided in the unit prior to January 1, 1990 in a development which relied on a special design requirement exemption. Current law requires that the limitation not be more proscriptive than to require that one person in residence in each dwelling unit may be required to be a senior and that each other resident may be required to be a qualified permanent resident.

Permitted Health Care Residents

Permitted health care resident is defined to include, in addition to the existing definition, a qualifying resident's family member who provides substantial live-in, long-term or terminal health care by either assisting the resident with necessary daily activities or providing medical treatment or both. Current law only includes a person hired to provide live-in, long-term, or terminal health care to a qualifying resident.

A permitted health care resident shall be entitled to continue his or her occupancy of the dwelling during the absence of the senior citizen for up to 90 days upon written request provided that the senior's absence is due to hospitalization or other necessary medical treatment and the senior expects to return within 90 days. Current law only allows a permitted health care resident to occupy the dwelling unit during periods that the person is actually providing care.

Furthermore, new provisions define "compensation" to allow relatives who provide home health services to be compensated with room and board. Current law does not include a definition.

Moreover, the new statute clarifies that permitted health care residents are not entitled to continue their occupancy upon the death or dissolution of marriage, or upon hospitalization, or other prolonged absence of the qualifying resident. The new law clarifies that caregivers are not qualified permanent residents. Current law permits qualified permanent residents to continue occupying the dwelling under these circumstances, but does not address a permitted health care provider's right to occupancy.

Temporary Residency

A senior citizen development shall allow temporary residency of guests less than 55 years of age for a period of not less than 60 days in any year. Current law allows guests less than 45 years of age under the same circumstances.

Reinstates Department of Real Estate Requirement

The new law requires senior housing developments in Riverside County provide a public report to the Department of Real Estate of their intent to build senior housing accommodations. This requirement is currently required in all other counties.

Bill Number: SB 2011 (Escutia), Chapter 1004
Code Sections Affected: Business and Professions Code section 11010.05; Civil Code sections 51.2, 51.3, and 51.4

Remedies

Effective January 1, 2001, the law provides that the Fair Employment and Housing Commission may not award reasonable attorney's fees, costs and expert witness fees to a prevailing party against the state. This change merely corrects a drafting oversight regarding the unavailability of attorney's fees and cost in housing discrimination. This clarification in Government Code section 12987 is to be consistent with section 12989.2 which already provides that attorney's fees and costs, including expert witness fees, are not recoverable against the state in an action brought by the state.

Bill Number: AB 2062 (Kuehl), Chapter 189
Code Sections Affected: Government Code sections 12965 and 12987

OTHER STATUTES

Civil Penalties under the Ralph Civil Rights Act

Effective January 1, 2001, a $25,000 civil penalty may be awarded to a person denied the right to be free from violence in any action brought by the Attorney General, a district attorney, or a city attorney. Under existing law, only in actions brought by the person denied the right to be free from violence is the $25,000 awarded.

Also effective January 1, 2001, existing law is changed to clarify that actions brought under the Bane Act are independent of any other actions, remedies or procedures provided for by law. Furthermore, this bill codifies the Legislature's intent that an action brought pursuant to the Bane Act for a violation of a person's constitutional right does not require that individual prove that he or she is a member of a protected class. The DFEH does not enforce the Bane Act.

Bill Number: AB 2719 (Wesson), Chapter 98
Code Sections Affected: Civil Code sections 52 and 52.1

Revised 12/5/00